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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-862

ANDREW FOSTER,
Petitioner

vs.

NOBLE PEARCY,
Respondent

BRIEF OF RESPONDENT
NOBLE PEARCY
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE INDIANA SUPREME COURT

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TABLE OF AUTHORITIES

Cases	Page
Boas v. Tate, 43 Ind. 60 (1873)	5
Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	3
Imbler v. Pachtman, 424 U.S. 409 (1976)	6
Kansas City Star v. Julian, 215 U.S. 589 (1909)	3
Spies v. Illinois, 123 U.S. 131 (1887)	3
Wolston v. Readers Digest Association, 99 S.Ct. 2701 (1978)	7

STATUTES

Civil Rights Act of 1871, 42 U.S.C. Section 1983	6
28 U.S.C. Section 1257(3)	3
Indiana Code Section 5-6-1-3 (Burns 1974)	5

RULES

Supreme Court of the United States Rule 24	1
Supreme Court of the United States Rule 23(1)(f)	4

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Pursuant to Rule 24 of the Rules of the United States Supreme Court, Respondent NOBLE F. PEARCY, hereby files his Brief in Opposition to the Petition for Writ of Certiorari of Petitioner ANDREW FOSTER. Pursuant to Rule 24(1) and (2), Respondent incorporates within his Brief certain objections to the jurisdiction of this Court and a statement of the reasons that the cause should not be reviewed by the United States Supreme Court.

I. STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Indiana Supreme Court seeking review of a judgment of that Court dismissing Petitioner's (hereinafter, FOSTER) Complaint in libel against Respondent, (hereinafter, PEARCY), for failure to state a claim under Indiana law.

FOSTER's Complaint alleged that LEROY NEW, a Deputy Prosecutor for Marion County, Indiana, defamed him by making certain extra-judicial statements about his involvement in drug trafficking, at a time when FOSTER was under indictment. The Complaint sought relief against the Deputy, and against PEARCY. PEARCY was at the time the Marion County Prosecutor.

The Trial Court dismissed for failure to state a claim, as to PEARCY, holding as a matter of law that there was no basis for vicarious liability (respondent-superior) or for a "negligence in hiring" claim.

The Indiana Court of Appeals reversed, holding that the Deputy could claim only a qualified privilege (malice), and that dismissal under Rule 12(B)(6), Indiana Rules of Trial Procedure was inappropriate.

> Since we have decided that New may claim a qualified rather than an absolute privilege, it is certainly possible that Foster could prove a set of facts to support his claim for relief against New and Pearcy.
>
> (Petition for Writ of Certiorari, Appendix A, page 23.)

The Indiana Supreme Court reversed the Indiana Court of Appeals on PEARCY's Petition to Transfer (Petition, Appendix B), holding the Deputy's statements absolutely privileged under two alternative theories: common law

immunity accorded prosecutors and the Indiana Tort Claims Act. (Petition, Appendix B, p. 11).

FOSTER presented the claim he seeks to press in this Court for the first time in a Petition for Rehearing in the Indiana Supreme Court. (Petition, Appendix C, page 5.)

The Petition for Rehearing - which asserted five issues, four of them state-law issues - was denied without comment. (Petition, Appendix D).

II. OBJECTIONS TO JURISDICTION

A. In his Petition for Writ of Certiorari, Petitioner seeks to predicate the jurisdiction of this Court on 28 U.S.C., Section 1247(3). (Petition, page 3). There is no such statute.

B. Assuming, arguendo, that Petitioner seeks to predicate the jurisdiction of this Court on 28 U.S.C., Section 1257(3), Petitioner does not seek to question the validity of a state statute on the grounds of its being repugnant to the Constitution, treatise, or laws of the United States. To the extent that Petitioner seeks to predicate jurisdiction on the existence of a right, privilege or immunity, "specially set up or claimed under the Constitution . . . ,", the case falls under the well-known rule that the Federal question sought to be presented to the United States Supreme Court may not be presented for the first time to the State Court to which Certiorari is sought in a Petition for Rehearing after the judgment of the State Supreme Court is announced. It is clear that as a procedural matter the "federal question", if there one, was never considered or decided by the Indiana Supreme Court. Spies v. Illinois, 123 U.S. 131, (1887); Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); Kansas City Star v. Julian, 215 U.S. 589 (1909).

C. In the nature of a Motion to Dismiss or Affirm, Respondent would point out to this Court that nowhere in his Brief does Petitioner claim that the question sought to be presented in this Court is substantial, nor does Petitioner cite to this Court any cases demonstrating the existence of a substantial federal question. Respondent would also point out to this Court that Petitioner does not refer to any portions of the record in paraphrasing the Complaint dismissed pursuant to Indiana Rules of Trial Procedure. Dismissal of that Complaint is the judgment for which Certiorari is sought, but the Petition for Writ of Certiorari merely paraphrases what Petitioner contends are the "highlights" of the Complaint, (See Petition pages 5 and 6), without referring the Court or Respondent in any way to the record. Rule 23(1)(f); Rule 23(4).

D. The Petition is formally deficient in that it fails to set out the ". . . stage in the proceedings in the court of first instance and in the Appellate Court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the Court", contrary to the provisions of Rule 23(1)(f), United States Supreme Court Rules. (See paragraph B above.)

III. CONSIDERATIONS MILITATING AGAINST REVIEW ON CERTIORARI

A. Petitioner in this case is seeking review of a judgment of a State Court decided on the basis of state law. Specifically, Petitioner is seeking review of a judgment dismissing his defamation Complaint against Respondent for acts allegedly committed by a subordinate of Respondent while Respondent was a Prosecuting Attorney in Marion County, Indiana.

The decision of the Indiana Supreme Court, attached to the Petition for Writ of Certiorari as Appendix B, does not decide any federal question. The decision of the Indiana Supreme Court is that a Prosecutor in Indiana has an absolute privilege for extrajudicial statements ". . . reasonably within the general scope of authority granted to Prosecuting Attorneys, . . ." (Appendix B, page 13).

Specifically with respect to Respondent, the Indiana Supreme Court decided that:

> "As far as Pearcy is concerned, it is immaterial whether New's statements were within or beyond the scope of his authority as a deputy. If the statement were beyond the scope of New's authority, Pearcy again cannot be liable as government officers are responsible only for the official acts of their deputies acting within the scope of their authority. I.C. Section 5-6-1-3 (Burns 1974); Boas v. Tate (1873) 43 Ind. 60. Consequently the Trial Court committed no error in rejecting the theory of respondent superior and thereby dismissing the Complaint against Pearcy. (Appendix B, pages 13-14).

The decision of the Indiana Supreme Court thus turned on an interpretation of Indiana state common law and statutory law regarding the scope of prosecutorial immunity for alleged defamatory statements, and on the application of an Indiana statute concerning the scope of vicarious liability of government officers for the acts of their subordinates. There is no federal question decided here.

Nor is there any "title, right, privilege or immunity" under the United States Constitution affected by this judgment. Petitioner, in his Statement of "Questions Presented", makes reference to a denial of due process visited upon Petitioner by virtue of his status as a criminal defendant or the subject of grand jury inquiry. If Petitioner thereby

asserts that he was, without due process of law, denied a "title, right, privilege or immunity" solely on the basis of his status as a criminal defendan or the subject of grand jury inquiry, he is in error. Whether this argument be viewed as a due process argument, in the sense that Petitioner was somehow specially punished for his status without appropriate judicial proceedings, or an equal protection issue in the sense that only criminal defendants or subjects of grand jury inquiry were so treated, it is erroneous. The thrust of the decision of the Indiana Supreme Court was to afford absolute prosecutorial immunity in certain types of cases regardless of the plaintiff. This immunity is not limited to use in cases in which the plaintiff is a criminal defendant or a subject of grand jury inquiry. Therefore, Petitioner's reliance on his particular status and Amendments 5 and 14 is misplaced. In fact, no constitutional right has been affected by the State Court's judgment.

In his statement of reasons for granting the Writ, (Petition, pages 10-13), Petitioner argues that in some way, the holding of the Indiana Supreme Court is contrary to the holding of this Court in Imbler v. Pachtman, 424 U.S. 409 (1976). Imbler was a case in which the scope of prosecutorial immunity under the 1871 Civil Rights Act, 42 U.S.C., Section 1983, was considered. The decision in Imbler has no bearing on the decision of the Indiana Supreme Court interpreting Indiana common law on the scope of prosecutorial immunity. No Section 1983 claim was ever made in the case.

Petitioner contends ". . . there is a federal constitutional interest directly opposed of (sic) the Indiana Supreme Court, to-wit: that of the right of a criminal defendant to have his trial conducted in the absence of prejudicial pretrial publicity." Petitioner seems to contend that the criminal defendant has a civil action for damages against those who allegedly subject him to prejudicial pretrial publicity. This assertion is made without citation of authority, was never presented in the record, was never presented in Plaintiff's

paraphrase of his Complaint contained in the petition, and in fact, was never contained in his complaint..

Petitioner contends that ". . . the public interest claimed by the Indiana Supreme Court is also contrary to the reasoning of this Court in the case of Wolston v. Readers Digest Association, 99 S.Ct. 2701 (1979)." (Petition, page 12). Wolston is completely immaterial to this case, inasmuch as it involves the scope of the First Amendment - based immunity for a publisher, not a state-law created prosecutorial immunity.

Finally, Petitioner contends that ". . . the opinion of the Indiana Supreme Court deprives him of an action he would otherwise have, except for his involvement of a target of the criminal justice system." (Petition, page 13). Even a cursory reading of the opinion of the Indiana Supreme Court discloses that the decision of the Indiana Supreme Court deprives Petitioner only of an action against a prosecuting attorney, one of whose deputies allegedly made extrajudicial statements. The opinion does not so much as hint that the application of prosecutorial immunity in this case depends on Petitioner's status as a target of the criminal justice system. Petitioner's contention that he is somehow punished as a result of his status is charitably characterized as a misstatement of the Indiana Supreme Court's opinion. (See Appendix B to the Petition.)

B. The decision on the immunity issue by the Indiana Supreme Court, while dispositive of the case, is only one of two alternative grounds given by the Indiana Supreme Court. As quoted above, in Section II(A) of this Brief, the Indiana Supreme Court also held that Respondent could not be vicariously liable for the act of his deputy pursuant to an Indiana statute. At no time in this proceeding has Petitioner claimed that the statute relied on by the Indiana Supreme Court in any way violates the United States Constitution either on its face or as applied. The Court does not have the language of that statute before it, but it is clear from the

Opinion of the Indiana Supreme Court that this statute constituted an alternative state-law ground for its decision dismissing Petitioner's Complaint against Respondent, on a theory of vicarious liability.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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